(21)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 625

J. H. JEFFERS,

Petitioner,

vs.

S. J. ISAACKS, Independent Executor of the Last Will and Testament of Martin V. Jeffers, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit in equity brought in the United States District Court for the District of New Mexico by Respondent against Petitioner. The original Complaint named Respondent and two others as Plaintiffs, and Petitioner and nine others as Defendants. Jurisdiction was based solely on diversity of citizenship, and the Complaint sought a partnership accounting (Transcript, page 3).

The original Complaint was filed March 8th, 1940 (Transcript, page 3); summons issued the same day, and was returned unserved by the Marshal June 26th, 1940, because no deposits of that official's fees and expenses were made, although demand was made for the payment of these items (Transcript, pages 16, 153). Alias summons issued July 20th,

1940, and was returned unserved by the Marshal August 12th, 1941, for the same reason (Transcript, pages 17, 154). A second alias summons issued May 18th, 1942, and was served on Petitioner June 19th, 1942 (Transcript, page 19).

The New Mexico statute of limitations applicable (Section 27-104 of the 1941 Compilation), and which is hereinafter set out, specified a period of four years for the bringing of an action of the kind here involved. It is undisputed that this statute began to run about April 1st, 1938, when Petitioner stated to Respondent that Respondent's testator had no interest in the cattle involved and refused to make an accounting. This is alleged in Paragraph IX of Respondent's Second Amended Complaint (Transcript, page 42). Respondent so testified (Transcript, pages 65, 66), and Petitioner likewise so testified (Transcript, page 119). This is definitely recognized in the opinion of the Circuit Court of Appeals (Transcript, page 247) and in the dissenting opinion (Transcript, page 252).

The original Complaint alleged the existence of a partnership between Martin V. Jeffers (Respondent's testator) and Petitioner and six other named parties for the conduct of an extensive cattle business. It set up an alleged partnership agreement, agreed on but not signed, and sought a partnership accounting (Transcript, pages 3, 15).

All the Plaintiffs except Respondent, and several of the Defendants were dismissed on Plaintiff's Motion (Transcript, pages 22, 23), and Amended Complaint was filed August 3rd, 1942, in which Respondent was sole Plaintiff, and Petitioner and seven other parties were Defendants (Transcript, page 24). This Amended Complaint set up the same partnership and sought an accounting.

Petitioner's Amended Answer to this Amended Complaint set up, among other defenses, the absence of indispensable parties (Transcript, page 34), which defense was sustained (Transcript, page 37). Respondent thereupon dismissed all of the Defendants except Petitioner (Transcript, page 38), and filed a second Amended Complaint (Transcript, page 40). In this Second Amended Complaint, Respondent abandoned all allegations with respect to a partnership and sought recovery from Petitioner as a trustee, alleging that cattle in two speci-

ned brands were turned over to Petitioner as trustee in 1906. Petitioner's Answer to the Amended Complaint set up, among others, the defenses of the statute of limitations and the absence of indispenable parties (Transcript, page 48).

In the course of the trial in the District Court, it was admitted that Respondent's testator, on October 3rd, 1930, transferred the two brands described in the Second Amended Complaint and the cattle to J. H. Jeffers and Sons (Transcript, pages 77, 112), a partnership composed of Petitioner and six others (Transcript, pages 155, 113).

The District Court held, in view of this transfer, that all the members of the partnership were indispensable parties and dismissed the Complaint (Transcript, page 55). The District Court ruled against Petitioner on the question of the statute of limitations (Transcript, page 234).

Respondent appealed to the Circuit Court of Appeals for the Tenth Circuit, and that Court reversed the judgment of the District Court. The opinion of that Court and its judgment are dated July 26th, 1944 (Transcript, pages 245, 253).

That Court held that Rule 3 of the Federal Rules of Civil Procedure changed the pre-existing Rule, as established by the decisions of this Court, that in order to interrupt the running of the statute of limitations, there must be not only the filing of the Complaint in time but no unreasonable delay in the service of summons. That Court also held that Respondent might recover against Petitioner alone without joining the other members of the partnership of J. H. Jeffers and Sons.

Bratton, C. J., dissented on both grounds (Transcript, page 251).

Motion for rehearing was filed in the Circuit Court of Appeals August 15th, 1944 (Transcript, page 255) and was denied August 28th, 1944 (Transcript, page 259).

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court has jurisdiction to review the judgment herein questioned under Section 240 of the Judicial Code, as amended (U. S. C., Title 28, Section 347). The jurisdiction of the District Court was based solely on diversity of citizenship, which is not questioned, and that

the amount in controversy greatly exceeded $3,000.00, which is likewise not questioned.

While the judgment of the Circuit Court of Appeals is not final in that it directs further proceedings in the District Court (Transcript, page 253), a decision of either of the points raised by Petitioner in his favor will finally dispose of the case; and finality of the judgment of the Circuit Court of Appeals is not required by the Section of the statute above referred to. Fuller Company vs. Otis Elevator Company, 245 U. S. 489.

QUESTIONS PRESENTED

The questions here presented are:

1. Has Rule 3 of the Federal Rules of Civil Procedure so changed the rule established by the decisions of this Court that the mere filing of a complaint, with no attempt to make service of summons for more than two years, interrupts the running of the statute of limitations?

2. Where cattle have been transferred to a partnership and run by the partnership for approximately ten years, may the transferror seek an accounting of the cattle operations in a proceeding against one only of the partners without joining the other members of the partnership?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of the Supreme Court; that is, it has given an interpretation to Rule 3 of the Federal Rules of Civil Procedure in conflict with Linn and Lane Timber Company vs. United States, 236 U. S. 574.

2. The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by the Supreme Court; that is, the Circuit Court of Appeals has decided important questions of practice under the Rules of Civil Procedure which should be settled by this Court. The proper practice under the Rules of Civil Procedure

has been recognized as a proper basis for certiorari in Leishman vs. Associated, etc. Company, 318 U. S. 203; Montgomery Ward vs. Duncan, 311 U. S. 243.

WHEREFORE, Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case entitled, on its docket, "No. 2867, S. J. Isaacks, Independent Executor of the Last Will and Testament of Martin V. Jeffers, Deceased, Appellant, vs. J. H. Jeffers, Appellee," to the end that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such other relief as to this Court may seem proper.

Dated October 20th, 1944.

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Las Cruces, New Mexico

Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1944

NO.....

J. H. JEFFERS,

Petitioner,

vs.

S. J. ISAACKS, Independent Executor of the Last Will and Testament of Martin V. Jeffers, Deceased,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Circuit Court of Appeals is found on page 245 of the Transcript, and has not yet been reported. The dissenting opinion of Bratton, C. J., appears on page 251 of the Transcript.

Jurisdiction

1. The date of the decree to be review is July 26th, 1944 (Transcript, page 253). Motion for rehearing was filed August 15th, 1944 (Transcript, page 255), and was denied August 28th, 1944 (Transcript, page 259).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code, as amended (U. S. C., Title 28, Section 347). The case believed to sustain said jurisdiction is Fuller Company vs. Otis Elevator Company, 245 U. S. 489.

Statement of the Case

This has already been stated in the preceding Petition, under "Summary Statement of the Matter Involved," which is hereby adopted and made a part of this Brief.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that the statute of limitations was interrupted by the filing of the Complaint when there was no diligence in making service of summons during a period of more than two years.

2. The Circuit Court of Appeals erred in holding that the members of the partnership of J. H. Jeffers and Sons other than the Petitioner were not indispensable parties.

ARGUMENT

Summary of the Argument

Point I. Reasonable diligence in the service of summons must be exercised to prevent the running of the statute of limitations, and no such diligence was exercised by Respondent until the issuance of the second alias summons on May 18th, 1942, which was served, but the statute of limitations had run about April 1st, 1942.

Point II. Inasmuch as the cattle involved had been transferred by Respondent's testator to a partnership about ten years prior to the filing of the Complaint and had been run by such partnership, all the members of the partnership were indispensable parties to the proceeding seeking an accounting for the handling of such cattle.

Point I

REASONABLE DILIGENCE IN THE SERVICE OF SUMMONS MUST BE EXERCISED TO PREVENT THE RUNNING OF THE STATUE OF LIMITATIONS, AND NO SUCH DILIGENCE WAS EXERCISED BY REPONDENT UNTIL THE ISSUANCE OF THE SECOND ALIAS SUMMONS ON MAY 18TH, 1942, WHICH WAS SERVED, BUT THE STATUTE OF LIMITATIONS HAD RUN ABOUT APRIL 1ST, 1942.

The rule with respect to the interruption of the statute of limitations by the filing of a complaint was established by the decision of this Court in Linn and Lane Timber Company vs. United States, 236 U. S. 574, where it is stated (page 578):

"The bills were filed and subpoenas were taken out and delivered to the marshal for service before the statute had run, reasonable diligence was shown in getting service, and therefore the rights of the United States against all the patents were saved. For when so followed up, the rule is pretty well established that the statute is interrupted by the filing of the bill."

See also U. S. vs. Hardy (C. C. A. 4) 74 F. (2d) 841, 842. Rule 3 of the Federal Rules of Civil Procedure provides:

"A civil action is commenced by filing a complaint with the Court."

Was this Rule intended to modify the rule laid down in the Linn and Lane case, supra? We earnestly submit that no such modification was contemplated.

No decision of a Circuit Court of Appeals, since the adoption of the Rules of Civil Procedure, can be found, involving any question of lack of diligence in serving the summons.

There have been some decisions of the District Courts. In U. S. vs. Spreckels, 50 F. Supp. 789, 790, it is stated:

"The modern Federal rule is that an action in equity is commenced by the filing of a complaint with the bona fide intent to prosecute the suit diligently, provided there is no unreasonable delay in the issuance or service of the subpoena. United States v. Hardy, 4 Cir., 74 F. 2d 841; United States v. Miller, C. C., 164 F. 444; Linn & Lane Timber Company v. United States, 236 U. S. 574, 35 S. Ct. 440, 59 L. Ed. 725."

In International Pulp Equipment Co. vs. St. Regis Kraft Co., 55 F. Supp. 860, it is stated:

"For the purpose of escaping the limitation statute, it was held in United States v. Spreckels, D. C., 50 F. Supp. 789, that an action is not commenced until (a) the complaint has been filed with a bona fide intent to prosecute the action diligently and (b) there is no unreasonable delay in

the issuance of service of the summons. The Spreckels case is persuasive, for it requires a litigant to do more than drop a pleading in the Clerk's office. It keeps a plaintiff's interest active, at least until he learns that service has been effected."

The notes of the Advisory Committee appended to Rule 3 seem to leave the question open as possibly one affecting substantive rights. These notes make reference to other Rules providing for dismissal for failure to prosecute, but it is difficult to see how these Rules affect the situation where Defendant does not know that he has been sued. These notes, and also the opinion of the Circuit Court of Appeals in the case under consideration, refer to Rule 4-a of the Federal Rules of Civil Procedure, requiring the Clerk to issue summons forthwith on the filing of a complaint (Transcript, page 249). The Clerk, of course, complied with this Rule in the present case, and promptly issued the summons and the two alias summons, but, of course, this reference to Rule 4-a has no real bearing in a situation where the Plaintiff fails and refuses to meet the Marshal's demands for a deposit to cover that official's expense. The prepayment of the fees of the Marshal is a part of reasonable diligence. Maier vs. Independent Taxi etc. Assn., (C. C. A. Dist. Columbia) 96 F. (2d) 579.

The New Mexico statutes applicable are Sections 27-104 and 27-106 of the Compilation of 1941, which are as follows:

"Those founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified within four (4) years."

"In actions for relief, on the ground of fraud or mistake, and in actions for injuries to, or conversion of property, the cause of action shall not be deemed to have accrued until the fraud, mistake, injury or conversion complained of, shall have been discovered by the party aggrieved."

There is no question that the statute began to run about April 1st, 1938. As we have set out in our "Summary Statement

of the Matter Involved," Petitioner repudiated any trust or other relationship about April 1st, 1938, and on that date, refused to make an accounting. This is alleged in Paragraph IX of Respondent's Second Amended Complaint and was testified to by both parties (Transcript, pages 65, 66, 119), and is clearly recognized in the opinion of the Circuit Court of Appeals (Transcript, page 247).

The Complaint was filed in ample time and summons issued, but Respondent failed to advance the Marshal's costs although requested to do so, and the summons was returned unserved (Transcript, pages 16, 153). Alias summons issued July 20th, 1940, and likewise, Respondent failed to advance the Marshal's costs, although requests were made that the funds be advanced (Transcript, pages 17, 154). This summons was returned unserved August 12th, 1941. The second alias summons was issued May 18th, 1942, and served after the statute of limitations had run.

It seems that the Respondent wholly failed to exercise reasonable or other diligence in the matter of obtaining service, and unless it can be held that such reasonable diligence in making service is no longer required, the case should be considered by the Supreme Court and reversed.

Point II

INASMUCH AS THE CATTLE INVOLVED HAD BEEN TRANSFERRED BY RESPONDENT'S TESTATOR TO A PARTNERSHIP ABOUT TEN YEARS PRIOR TO THE FILING OF THE COMPLAINT AND HAD BEEN RUN BY SUCH PARTNERSHIP, ALL THE MEMBERS OF THE PARTNERSHIP WERE INDISPENSABLE PARTIES TO THE PROCEEDING SEEKING AN ACCOUNTING FOR THE HANDLING OF SUCH CATTLE.

It is undisputed that Respondent's testator transferred the cattle and the brands to the partnership of J. H. Jeffers and Sons on October 3rd, 1930 (Transcript, pages 177, 112), a partnership composed of six others besides Petitioner (Transcript, pages 55, 113). This transfer was made more than seven years prior to the death of Respondent's testator in 1938 and ap-

proximately ten years prior to the filing of the original Complaint.

In the Second Amended Complaint, Respondent seeks to include in the accounting all matters connected with the handling of the cattle up to the death of Martin V. Jeffers in 1938 (Transcript, pages 41, 42). Respondent alleges in the Second Amended Complaint that Petitioner has in his possession property belonging to Martin V. Jeffers, meaning, of course, at the time of the filing of the Second Amended Complaint. (Transcript, page 42). Respondent, therefore, by his pleading, seeks to include in the accounting the handling of the cattle during the period subsequent to the execution of the bill of sale by Respondent's testator in 1930. It has been settled law since the decision of the Supreme Court in Bank vs. New Orleans and Carrollton Railroad Company, 78 U. S. 624, that all the members of a partnership are indispensable parties to a proceeding seeking an accounting by the partnership, for all the Petitioners must necessarily be directly affected by any decree that may be made in such a proceeding.

See McLaughlin & Brothers vs. Hollowell, 228 U. S. 278; Lee vs. Lehigh Valley Coal Company, 267 U. S. 541.

The rule with respect to parties was announced by this Court in the early decision of Shields et al vs. Barrows, 58 U. S. 130, as follows:

> "The Court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have a interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such

a condition that its final termination may be wholly inconsistent with equity and good conscience."

This rule of law remains unchanged to this day, and is recognized in Rule 19 of the Federal Rules of Civil Procedure.

Whether Respondent's testator, at the time of the execution of the bill of sale to the partnership, intended to retain some interest in the cattle, there can be no question that the partnership of J. H. Jeffers and Sons was formed and the legal title vested in the partnership and the cattle were thereafter run by the partnership. It would seem to make no difference whether, as Respondent contends and as the Circuit Court of Appeals held, Respondent is seeking only an accounting from J. H. Jeffers, because when Respondent's testator executed the bill of sale, even if he retained an interest in the cattle, the bill of sale ran to the partnership and not to the Petitioner alone.

If it is claimed that the bill of sale was without consideration or is defective for some other reason, all the grantees in the bill of sale are indispensable parties. Manderfield vs. Field, 7 N. M. 17, 32 P. 146; Page vs. Gallup, 26 N. M. 239, 191 P. 460; Franz et al vs. Buder, 11 F. (2d) 854.

It would seem, therefore, that the writ herein prayed for should be granted on the second ground above set out, and the question of indispensable parties here involved considered by the Court.

Respectfully submitted,

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